Supreme Court, U.S.
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No. 96-572

In The

Supreme Court of the United States

October Term, 1996

DOUGLAS G. BAUGHER and
ORIUS ASSOCIATES, INC.,

Petitioners,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State of California Third Appellate District

PETITIONERS' REPLY MEMORANDUM

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1. ALTHOUGH THE DECISION OF THE CALIFORNIA THIRD DISTRICT COURT OF APPEAL WAS NOT OFFICIALLY PUBLISHED, THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY'S DEPARTMENT OF PESTICIDE REGULATION, PUBLISHED THEIR VERSION OF THE COURT'S DECISION VIA A NEWS RELEASE (NO. 96-10) WHICH APPEARS ON THE INTERNET AVAILABLE TO ANYONE IN THE WORLD

The Respondent argues that "there is no important or compelling reason to correct [the improper reversal of the jury's unanimous verdict] in this unpublished California case." However, the California Environmental Protection Agency, Department of Pesticide Regulation, has taken it upon itself to *publish* its own version of the holding of the Third District Court of Appeal on the World Wide Web. A true and correct copy of the News Release as printed from the Internet is appended hereto. Cal-EPA is the successor agency which the petitioners successfully prevailed against in the trial court and many of the employees of the Department of Food and Agriculture, Department of Pesticide Regulation, are now employed at Cal-EPA in substantially identical positions.

2. THE QUESTION RELATING TO WHETHER DR. BAUGHER WAS A LIMITED PURPOSE PUBLIC FIGURE IS NOT MOOT: THE CALIFORNIA COURT OF APPEAL SPECIFICALLY RULED ON THE LIMITED PURPOSE PUBLIC FIGURE ISSUE AND DETERMINED THAT THE PLAINTIFFS WERE PUBLIC FIGURES WITH REFERENCE TO THE PESTICIDE STUDY

The Respondent argues that this court need not consider whether the Petitioners were limited purpose public figures because the Court of Appeal limited the inquiry of malice to the statements made by Veda Federighi. However, one of the basis for this petition for Writ of Certiorari is that the state appellate court improperly, and contrary to the holding in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), limited its inquiry to Veda Federighi's statements by applying the "derivative immunity" privilege to Veda Federighi's statements. As the Petitioners pointed out in their Petition, the repetition of defamatory comments of low level employees outside of any "protected proceedings" are not privileged.

Thus, the jury's verdict in which they clearly indicated that they found the statements made by Veda Federighi were *false* (a copy of the trial court's judgment containing exact quotations from the jury's verdict form is attached hereto) should not be ignored as relating to a "moot" issue, but rather compels review of the limited purpose public figure issue in that the judgment for the

petitioners should be reinstated if the petitioners were *not* limited purpose public figures.

Respectfully submitted,

UREMOVIC & FELGER

Dated: December 17, 1996.

JOSEPH A. UREMOVIC
Attorneys for Plaintiffs/ Respondents/ Cross-Appellants BAUGHER, ET AL.

APPEALS COURT REVERSES $4.5 MILLION DEFAMATIO . . .

News Release

California Environmental Protection Agency

Department of Pesticide Regulation

Release No. 96-10
Date: April 3, 1996

APPEALS COURT REVERSES $4.5 MILLION DEFAMATION JUDGMENT

SACRAMENTO – A state court of appeals has reversed a $4.5 million defamation judgment against Cal/EPA's Department of Pesticide Regulation. The court ruled that statements made by a Department spokesperson regarding a researcher – whose conduct during a human exposure study was being investigated – did not meet the legal standard for defamation.

In a recent ruling, the Third District Court of Appeals in Sacramento ruled the trial judge had erred in instructing the jury on defamation law.

The suit had been brought against the Department in 1990 by Dr. Douglas Baugher, a pesticide researcher, and his firm, Orius Associates, Inc. The suit claimed that Baugher and Orius had been defamed in February 1989 when their names were released to the press in conjunction with an ongoing investigation.

On February 22, 1989, the Department issued a press release announcing an investigation into the conduct of researchers who had "apparently violated approved procedures during a research project." The 1988 project studied filed worker exposure to phosalone, manufactured

under the trade name Zolone. The pesticide had been implicated in a series of field worker illnesses, prompting the Department to insist that the manufacturer eliminate its use on hand-harvested crops. The manufacturer, Rhone-Poulenc Ag Co., did so and then commissioned the study to determine the degree of phosalone exposure to workers harvesting crops by hand.

The Department's press release was critical of the scientists who conducted the experiment, saying they had "apparently violated the ethics of their profession." The press release did not cite the researchers by name, but their names were given out by a Department spokesperson to reporters who requested them. A press release issued by a government agency is considered privileged and immune from defamation actions; however, statements by lower-ranking government employees are not considered privileged.

In his suit, Baugher maintained that the Department maliciously defamed him by releasing his name. The Department argued that the names of all involved were a matter of public record.

The trial court characterized Baugher as "a limited-purpose public figure" because he knew the study was controversial and would attract media attention, and he willing gave newspaper, radio and television interviews before and during the study. Under defamation law, "public figures" must prove that a potentially defamatory statement was made with constitutional malice, that is, with knowledge it was false or with reckless disregard of whether it was false or not.

During the 1994 trial before a Sacramento Superior Court judge and jury, Baugher's attorney maintained that while

there was not "constitutional malice" on the part of the Department spokesperson who revealed his name, Department employees who supplied her with information did exhibit the necessary "malice" required for a finding of defamation. The trial court agreed, and instructed the jury to consider this expanded view of "constitutional malice." The jury found that Baugher had been defamed and awarded him $5 million in damages (later lowered by the trial court to $4.5 million). The Department appealed the judgment.

In overturning the lower court ruling and dismissing the expanded view of defamation, the appeals court wrote in an unpublished opinion: "As a practical matter, the statements of high-ranking executive officials can invariably be traced to factual information provided by their subordinates." The statements of these officials are privileged, the court continued, but "the absolute privilege has virtually no impact if the officials' statements can be traced to their lower-ranking employees. The string of damages for defamation and the deterrent effect on the freedom of action of high-ranking officials will be the same regardless whether liability results directly from the privileged statement or derivatively through the antecedent statements of lower-ranking employees upon which it is founded."

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

DOUGLAS G. BAUGHER AND ORIUS ASSOCIATES, INC., PLAINTIFFS . . .

STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL. DEFENDANTS . . .

JUDGMENT ON VERDICT

THIS CAUSE came on regularly for trial JOSEPH A. UREMOVIC appearing as counsel for the plaintiffs, and CORINNE LEE MURPHY and DARRYL L. DOKE for the defendants.

THEREUPON, a jury of twelve persons was duly accepted, empaneled and sworn to try said cause. Witnesses on the part of the plaintiffs and defendants were duly sworn and examined.

WHEREUPON, after hearing the evidence, the arguments of Counsel and instructions of the Court, the cause was submitted to the jury, who retired to deliberate upon their verdict, and subsequently returned into court, and, being called, all answered to their names, and then rendered the following verdict, which was accepted by the Court and entered on the minutes, as follows:

In The Superior Court of the State of California
In and For the County of Sacramento

DOUGLAS G. BAUGHER AND ORIUS ASSOCIATES, INC., Plaintiffs, VS. STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL., Defendants.	NO. 515997 DEPT. 16 SPECIAL VERDICT (Filed Apr. 18, 1994)

We, the Jury, respond to the questions set forth below, as follows:

QUESTION NO. 1: Were any of the Statements contained in the California Department of Food and Agriculture's (CDFA's) press release of February 22, 1989, as they pertained to plaintiffs Douglas G. Baugher and/or Orius Associates, Inc., false?

Answer: Yes

QUESTION NO. 2: Did any employee of CDFA have knowledge of the falsity of the information in the press release of February 22, 1989 or entertain serious doubts as to the truth of such information when plaintiffs' names were released to the press as being under investigation regarding the grape harvester exposure study concerning "zolone"?

QUESTION NO. 3: Did any employee of CDFA intentionally inflict emotional distress on the plaintiff?

Answer: Yes

QUESTION NO. 4: Did defendant's actions cause plaintiffs' damage?

Answer: Yes

QUESTION NO. 5: We find that plaintiffs Douglas G. Baugher and Orius Associates, Inc. are entitled to damages in the amount of $5,000,000.00.

DATED: April 15, 1994.

s/ Christy Anderson
FOREPERSON

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs DOUGLAS G. BAUGHER and ORIUS ASSOCIATES, INC. do have and recover from defendant STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, the sum of FIVE MILLION AND NO/100 DOLLARS ($5,000,000.00) with interest thereon at the rate of seven per cent per annum from the date hereof, until paid, together with said plaintiffs' costs and disbursements incurred in this action, amounting to the sum of $_____.

DATED: APRIL 18, 1994.

[SEAL]

/s/ Cecily Bond
CECILY BOND,
JUDGE OF THE
SUPERIOR COURT